No. 05-___

IN THE
# Supreme Court of the United States

ORLANDO CORTEZ CLARK,
*Petitioner*,

v.

COLORADO DEPARTMENT OF CORRECTIONS, *et al.*,
*Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

## PETITION FOR A WRIT OF CERTIORARI

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December 16, 2005

## QUESTION PRESENTED

Whether the Prison Litigation Reform Act requires a court to dismiss all claims brought by a prisoner, including those that have been administratively exhausted, when at least one claim has not been exhausted.

## LIST OF PARTIES

**Petitioner:**

Orlando Cortez Clark

**Respondents:**

Colorado Department of Corrections

Dr. Nweke, C.C.C.F. Medical

Dr. Fallhouse, C.C.C.F. Medical

Dr. Joseph Wermer, A.V.C.F. Medical

Cindra Martinez

Dr. Raymond L. Lilly

Dr. Kenneth D. Danylchuck

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner Orlando Cortez Clark respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit (Pet. App. 1a) is unpublished. The district court's memorandum dismissing the case (Pet. App. 5a) is unpublished. The Magistrate Judge's order directing petitioner to file an amended complaint (Pet. App. 10a) is unpublished.

## JURISDICTION

The judgment of the court of appeals was entered on October 3, 2005. Pet. App. 1a. This Court has jurisdiction under 28 U.S.C. 1254(1).

## STATUTE INVOLVED

The provision of the Prison Litigation Reform Act ("PLRA") addressing the exhaustion requirement at issue in this case, 42 U.S.C. 1997e(a), provides:

> No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

## STATEMENT

On November 22, 2004, petitioner Orlando Cortez Clark, a state prisoner, filed a lawsuit pursuant to 42 U.S.C. 1983 in which he brought two separate claims that prison officials violated his Eighth Amendment rights by exhibiting deliberate indifference to his serious medical needs. Clark exhausted his

administrative remedies regarding only one of the two claims in his complaint. The PLRA mandates that prisoners exhaust administrative remedies before filing a lawsuit, *see* 42 U.S.C. 1997e(a), and thus the district court below properly dismissed Clark's unexhausted claim. However, Tenth Circuit precedent requires that courts go even farther and dismiss *all* claims in a complaint containing at least one unexhausted claim. Following this precedent, the district court concluded that it must dismiss both of Clark's claims, and the Tenth Circuit affirmed that result. Because the Tenth Circuit's determination that the PLRA contains a "total exhaustion" requirement mandating dismissal of an entire complaint whenever there is at least one unexhausted claim directly conflicts with decisions of the Second and Ninth Circuits, and is also wrong on the merits, this Court should grant review.

**A. Factual Background**

In 2001, Clark was incarcerated at the Crowley County Correctional Facility ("CCCF"), which is operated by the Colorado Department of Corrections. In June 2001, Clark began to experience pain in his lower back and legs. Compl. at 2. He was examined by doctors at the CCCF Medical Department on several occasions, but he was treated only for a low potassium level. *Id.* at 2-3. On November 22, 2001, doctors in the CCCF Medical Department diagnosed Clark as suffering from a pinched nerve resulting from degenerative disc disease. *Id.* at 3. Clark was not, however, treated for this injury. *Id.*

In April 2002, Clark was transferred to the Arkansas Valley Correctional Facility ("AVCF"), where he continued to seek medical treatment for his back and leg pain. *Id.* An MRI in August 2002 revealed damage to the discs in Clark's back. *Id.*

It was not until nine months later, however, that Clark was scheduled for surgery to correct the problem. *Id.*

On May 7, 2003, Clark underwent back surgery at the Parkview Medical Center in Pueblo, Colorado. *Id.* When he returned to AVCF on June 26, 2003, his medically-prescribed shoes were confiscated and not returned to him until September 25, 2003. *Id.* at 4. During that three-month period, Clark was forced to wear prison boots, which aggravated his lower back pain and leg injury. *Id.* In addition, although the surgeon had stated in Clark's medical records on May 15, 2003, that Clark should be provided with a "rigid ankle-foot brace," he was not given the brace until nearly eight months later. *Id.* Even though Clark was in continual pain following the operation, prison officials did not provide him with the pain medication he requested. *Id.* As a result of the inadequate post-operative care, Clark "is unable to walk normally and must use the rigid ankle-foot brace in order to walk any distance, and sometimes must use a cane." *Id.*

**B. Administrative Proceedings Below**

To exhaust administrative remedies under the Colorado Department of Corrections' grievance procedure, an inmate must first attempt to resolve the matter informally. *See* DOC Administrative Regulation 850-4, Grievance Procedure at IV.D.1. After attempting informal resolution, the inmate must complete a three-step formal grievance procedure. *See id.* at IV.D.2-D.4. If a grievance is denied after a review of the substantive issues presented, the response at the third and final step of the formal grievance procedure certifies that the grievance procedure has been exhausted. *See id.* at IV.D.4.g.

Clark filed three grievances relating to his inability to

obtain proper medical care for his back injury, and he pursued all three to the third and final step of the grievance process. Pet. App. 7a. The first grievance, filed before his surgery, explained that he was suffering from lower back and leg pain and requested an extra mattress to alleviate the pain. Pet. App. 8a. It was not until the third step of this grievance, however, that Clark alleged he was denied effective pain medication and that necessary surgery was delayed. *Id.* The two other grievances related to Clark's complaint that he did not receive sufficient post-operative care, specifically the prescribed pain medication, orthopedic shoes, TED hose, ankle/foot brace, and medical pillow – all of which were prescribed by his doctor for his recovery from surgery. *Id.*[1]

**C. Judicial Proceedings Below**

Proceeding *pro se*, Clark filed a complaint in the United States District Court for the District of Colorado pursuant to 42 U.S.C. 1983 based on two separate violations of his Eighth Amendment rights. First, he alleged that defendants denied him effective medication for severe lower back and leg pain for an extended period of time beginning in April 2001 and delayed surgery after it was apparent that surgery was necessary. Second, he claimed that he received inadequate medical care after his surgery on May 7, 2003, because he did not receive the prescribed pain medication, orthopedic shoes, TED hose, ankle/foot brace, or medical pillow in a timely manner required

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[1] This Court recently granted review in *Woodford v. Ngo*, No. 05-416 (Nov. 14, 2005), on the question whether the PLRA's exhaustion requirement can be satisfied by an untimely or otherwise defective administrative appeal. That issue is not presented by this case.

for his recovery from back surgery. The federal district court exercised jurisdiction over his claims pursuant to 28 U.S.C. 1331. *See* Compl. at 4-7.

On December 8, 2004, Magistrate Judge O. Edward Schlatter ordered Clark to file within thirty days an amended complaint alleging specific facts to demonstrate how each defendant personally participated in violating his constitutional rights. In that same order, Magistrate Judge Schlatter "advised" Clark that the PLRA contains an exhaustion requirement and that the Tenth Circuit reads section 1997e(a) to place the burden on the prisoner to plead exhaustion of administrative remedies, either by "attach[ing] copies of administrative proceedings or describ[ing] their disposition with specificity." Pet. App. 12a.

On December 17, 2004, Clark submitted an amended complaint in which he alleged that he had exhausted all his administrative remedies, and he attached to his complaint copies of the three administrative grievances that he had filed.

The district court concluded that Clark had properly exhausted the second claim in his complaint regarding post-operative care, but not the first claim that surgery was improperly delayed and that he was denied pain medication prior to the surgery. Pet. App. 8a. Although Clark had articulated these problems in a grievance over the prison's failure to provide him with a second mattress to alleviate his back pain, he had not raised this issue until the third step of the grievance procedure. The district court noted that the DOC grievance process does not permit an inmate to raise in a subsequent step an issue that was not raised in each prior step, Pet. App. 8a-9a (citing DOC Administrative Regulation 850-4), and thus the court concluded that he had not exhausted his

administrative remedies as to this claim. "As a result," the court stated, "the entire complaint must be dismissed because § 1997e(a) imposes a total exhaustion requirement on prisoners. *See Ross v. County of Bernalillo*, 365 F.3d 1181, 1189 (10th Cir. 2004)." Pet. App. 9a. Clark then filed a motion to reconsider that was denied on March 4, 2005.

Clark appealed from this final decision by the district court, and the court of appeals exercised jurisdiction over his appeal pursuant to 28 U.S.C. 1291. The Court of Appeals affirmed in an unpublished opinion that relied on its earlier decision in *Ross* holding that the PLRA requires dismissal of the entire complaint, including claims that had been completely exhausted, if one claim in the complaint is unexhausted. Pet. App. 3a. As explained below, that decision squarely conflicts with decisions of the Second and Ninth Circuits.

## REASONS FOR GRANTING THE PETITION

### I. This Court's Intervention Is Needed To Resolve A Circuit Split On The Question Whether The PLRA Requires Total Exhaustion.

This case raises an important question on which there is an acknowledged and deep circuit split: whether the PLRA requires the district court to dismiss the entire action if even one claim in the complaint is unexhausted, or whether it requires dismissal of only the unexhausted claims. The Second and Ninth Circuits have concluded that the PLRA requires dismissal only of the unexhausted claims. Those rulings are in direct conflict with the Tenth Circuit's "total exhaustion" rule mandating dismissal of an entire action without prejudice if one or more claims in a prisoner's complaint is unexhausted. *Compare Lira v. Herrera*, 427 F.3d 1164 (9th Cir. 2005) (noting

circuit split and holding that PLRA permits exhausted claims to go forward) *and Ortiz v. McBride*, 380 F.3d 649, 651 (2d Cir. 2004), *cert. denied* 125 S. Ct. 1398 (2005) (same) *with Ross v. County of Bernalillo*, 365 F.3d 1181, 1182 (10th Cir. 2004) (holding that PLRA requires dismissal of the entire action if any claims are unexhausted).

The two other circuit courts to have addressed this issue, the Sixth and the Eighth Circuits, have issued conflicting decisions and have failed to resolve the intracircuit conflict through an *en banc* rehearing. *Compare Hartsfield v. Vidor*, 199 F.3d 305 (6th Cir. 1999) (holding that PLRA permits exhausted claims in mixed petition to go forward) *and Kozohorsky v. Harmon*, 332 F.3d 1141, 1144 (8th Cir. 2003) (same) *with Bey v. Johnson*, 407 F.3d 801 (6th Cir. 2005), *reh'g en banc denied* (Oct. 12, 2005) (holding that PLRA requires requires dismissal of exhausted and unexhausted claims) *and Graves v. Norris*, 218 F.3d 884, 885 (8th Cir. 2000) (same). As a result, the district courts in those circuits have reached conflicting results and expressed confusion as to which precedent to follow. *See infra* at 11-12 (citing district court cases).

### A. The Tenth Circuit Reads The PLRA To Require Total Exhaustion.

In *Ross v. County of Bernalillo*, the Tenth Circuit first held that the PLRA contains a total exhaustion rule requiring dismissal of the action if even one claim in the complaint is unexhausted. In its opinion below, a panel of the Tenth Circuit cited *Ross* in support of its dismissal of petitioner Clark's entire suit, stating "we have held that 'the PLRA contains a total exhaustion requirement and . . . the presence of unexhausted claims in [a prisoner]'s complaint requires [a] district court to dismiss his action in its entirety without prejudice.' *Ross v.*

*County of Bernalillo*, 365 F.3d 1181, 1190 (10th Cir. 2004)." Pet. App. 3a (alterations in original).

The PLRA's exhaustion requirement, 42 U.S.C. 1997e(a), states that "[n]o action shall be brought . . . until such administrative remedies as are available are exhausted." In *Ross*, the Tenth Circuit reasoned that section 1997e(a) "suggests a requirement of total exhaustion because it prohibits an 'action' (as opposed to merely preventing a 'claim') from proceeding until administrative remedies are exhausted." 365 F.3d at 1190. The Tenth Circuit did not discuss the fact that section 1997e(c), not section 1997e(a), addresses dismissals. Nor did that court examine other provisions of the PLRA to determine whether the terms "claim" and "action" are used consistently throughout the statute.

To support its conclusion, *Ross* drew an analogy between prisoner lawsuits and habeas corpus actions, in which total exhaustion is required, and concluded that a total exhaustion requirement would further the purposes of the PLRA just as it promotes the goals of habeas. The Tenth Circuit reasoned that, as in habeas cases, "a total exhaustion rule would encourage prisoners to make full use of inmate grievance procedures and thus give prison officials the first opportunity to resolve prisoner complaints," would "facilitate the creation of an administrative record that would ultimately assist federal courts in addressing the prisoner's claims," and would "relieve district courts of the duty to determine whether certain exhausted claims are severable from other unexhausted claims that they are required to dismiss." *Id.* at 1190.

**B. In The Second And Ninth Circuits Total Exhaustion Is Not Required.**

The Second Circuit rejected the Tenth Circuit's "total exhaustion" rule in *Ortiz v. McBride*, 380 F.3d 649, 651 (2d Cir. 2004), *cert. denied* 125 S. Ct. 1398 (2005). The court began by quoting 42 U.S.C. 1997e(a)'s mandate that "'[n]o action shall be brought . . . until such administrative remedies as are available are exhausted.'" 380 F.3d at 656. Although the Second Circuit found that Ortiz's action was improperly "brought" under section 1997e(a) because it contained an unexhausted claim, the court concluded that the PLRA did not require dismissal of the entire action. After noting that the section of the PLRA addressing dismissals, 42 U.S.C. 1997e(c), is "silent on the issue," the Second Circuit concluded that "section 1997e is 'too ambiguous' to sustain the conclusion that Congress intended to require district courts to dismiss any prisoner's action containing one or more unexhausted claims rather than to dismiss only the offending claims." *Id.* at 657-658 (quoting *Rose v. Lundy*, 455 U.S. 509, 516 (1982)).

The Second Circuit then turned to the legislative history and policies underlying the PLRA's exhaustion doctrine to resolve the issue. *Id.* at 658. The clear purpose of the PLRA was "'to reduce the quantity and improve the quality of prisoner suits.'" *Id.* (*quoting Porter v. Nussle*, 534 U.S. 516, 524 (2002)). Dismissal of "mixed" actions in their entirety would undermine this goal, the court concluded, because it would burden the courts and delay litigation by leading prisoners to drop unexhausted claims and immediately refile the same lawsuit with the same court. *Id.* at 658. Furthermore, the policy would encourage prisoners to file a separate lawsuit for each claim to avoid the harsh result of dismissal of the entire action when just

one claim was found to be unexhausted. *Id.* The end result would be *more* prisoner litigation, not less as the PLRA intended.

The Second Circuit noted that its decision conflicted with the Tenth Circuit's decision in *Ross* as well as with the Eighth Circuit's per curiam decision in *Graves v. Norris*. *Id.* at 656 n.3. But the court commented that *Ross* based its contrary view of the PLRA largely on an analogy to the complete exhaustion requirement in habeas corpus cases – an analogy the Second Circuit rejected on the ground that the exhaustion requirement in habeas corpus serves the principle of comity toward state courts, while the exhaustion requirement in the PLRA is designed to streamline and limit prisoner litigation. *Id.* at 559-661.

The Ninth Circuit in *Lira v. Herrera* joined the Second Circuit. Like the Second Circuit, the Ninth Circuit concluded that section 1997e(a) did not mandate dismissal of the entire action, and it found that the text and structure of the PLRA as a whole supported this reading. The Ninth Circuit determined that the PLRA was "dispositive" of the issue, and for that reason rejected the Tenth Circuit's analogy to complete exhaustion in the habeas corpus context. 427 F.3d at 1173. In any case, the court concluded that the purposes of the PLRA would not be forwarded by adoption of the total exhaustion rule. *Id.* at 1174-75.[2]

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[2] *Lira* differed from *Ortiz* slightly in its advice to lower courts as to how to deal with mixed petitions. In light of the PLRA's text and policy rationale, the Ninth Circuit concluded that a "dual rule" is appropriate. If the exhausted and unexhausted claims are "closely related and difficult to

### C. The Sixth And Eighth Circuits Have Issued Inconsistent Decisions On The Question Whether The PLRA Requires Total Exhaustion.

The Sixth and Eighth Circuits have not been consistent on the question whether the PLRA requires total exhaustion, which has lead to confusion in the district courts of those circuits.

In *Hartsfield v. Vidor*, a prisoner filed a "mixed" complaint containing both exhausted and unexhausted claims. The Sixth Circuit held that the unexhausted claims must be dismissed, but permitted the exhausted claims to go forward. 199 F.3d 305. Thereafter, the Sixth Circuit cited *Hartsfield* to support its conclusion that "[if] a complaint contains exhausted and unexhausted claims, the district court may address the merits of the exhausted claims and dismiss only those that are unexhausted." *Williams v. McGinnis*, 234 F.3d 1271, 2000 WL 1679471, at *2 (6th Cir. 2000) (citing *Hartsfield*, 199 F.3d at 309); *accord Fisher v. Wickstrom*, 230 F.3d 1358, 2000 WL 1477232, at *1 (6th Cir. 2000); *McElhaney v. Elo*, 230 F.3d 1358, 2000 WL 1477498, at *3 (6th Cir. 2000).

On April 27, 2005, a split panel of the Sixth Circuit held, contrary to *Hartsfield*, that the PLRA requires total exhaustion. *Bey v. Johnson*, 407 F.3d 801 (6th Cir. 2005), *reh'g en banc den'd* (Oct. 12, 2005). In dissent, Judge Clay accused the

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untangle," the court should dismiss the defective complaint with leave to amend to allege only the fully exhausted claims. *Id.* 427 F.3d at 1175. If the exhausted and unexhausted claims are not intertwined, as the Ninth Circuit thought might often be the case, then the district court should dismiss only the unexhausted claims and permit the exhausted claims to go forward. *Id.*

majority of "ignor[ing] the principle of *stare decisis*," *id.* at 811, and stated that its decision violated Sixth Circuit Rule 206(c), which mandates that "[r]eported panel opinions are binding on subsequent panels" and can only be overruled by the entire Sixth Circuit sitting *en banc*. 407 F.3d at 810. He declared that "[b]ecause we are bound by *Hartsfield* unless and until the *en banc* court holds otherwise, the majority's contrary opinion is not the controlling law in the Sixth Circuit, and should not be followed by future panels of this Court." *Id.*

Since *Bey* was decided, several of the district courts in the Sixth Circuit have declined to follow the total exhaustion rule on the ground that *Hartsfield*, and not *Bey*, is the law of the circuit, while others have concluded that *Bey* is the controlling precedent. *Compare Garner v. Napel*, 374 F. Supp. 2d 582, 584-585 (W.D. Mich. 2005) ("The Court has reviewed the *Jones Bey* decision and cannot, in good conscience, apply *Jones Bey* because it is void under Sixth Circuit law."), *with Day v. Mathai*, 2005 WL 2417092 (E.D. Mich. Sep. 30, 2005) (following *Bey* and dismissing exhausted and unexhausted claims). Nonetheless, the Sixth Circuit denied rehearing en banc in *Bey* on October 12, 2005, and thus the confusion in that circuit will likely continue.

The Eighth Circuit has also issued inconsistent decisions. In *Graves v. Norris*, 218 F.3d 884 (8th Cir. 2000), the Eighth Circuit held in a one-page per curiam opinion that failure to exhaust as to one claim obligated dismissal of the entire complaint. In a subsequent decision, however, the Eighth Circuit held that a district court abused its discretion in denying a petitioner's request to amend his complaint to omit the unexhausted claim. *See Kozohorsky v. Harmon*, 332 F.3d 1141, 1144 (8th Cir. 2003). District courts in the Eighth Circuit have

noted the conflict between *Kozohorsky* and *Graves* and have reached different results on the question whether dismissal of the entire action is required when one or more claims in a prisoner's complaint is unexhausted. *Compare Monaco v. Sawyer*, 2004 WL 2066831 at *2 (D. Minn. Aug. 31, 2004) (noting conflict between *Kozohorsky* and *Graves* and giving plaintiff opportunity to amend his complaint and continue with exhausted claims), *with Braimah v. Shelton*, 2005 WL 1331147 (D. Neb. May 20, 2005) (noting conflict between *Kozohorsky* and *Graves* and dismissing action).[3]

**D. This Court's Intervention Is Needed To Resolve The Circuit Split.**

In light of this conflict, prisoners who file suit in the Second and Ninth Circuits will be permitted to proceed with their

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[3] District courts in other circuits have noted the confusion and have themselves been split on the question. *See, e.g., Boyd v. Pugh*, 2005 WL 1430087 at *3 n.1 (M.D. Pa. Jun. 17, 2005) (noting "disagreement among the Circuits" and declining to adopt "total exhaustion" rule); *Rivera v. Whitman*, 161 F. Supp. 2d 337, 339-343 (D. N.J. 2001) (noting split and adopting total exhaustion rule), *rev'd on other grounds sub nom. Ray v. Kertes*, 285 F.3d 287 (3d Cir. 2002); *Donovan v. Magnusson*, 2004 WL 1572598 (D. Me. June 7, 2004) (adopting total exhaustion rule); *Henderson v. Sebastian*, 2004 WL 1946398 at *5 (W.D. Wis. Aug. 25, 2004) (noting circuit split and rejecting total exhaustion rule in light of Seventh Circuit precedent suggesting that partial dismissals are appropriate); *Gidarisingh v. McCaughtry*, 2005 WL 2428155 at *12 (E.D. Wis. Sep. 30, 2005) (same); *Johnson v. True*, 125 F. Supp. 2d 186, 188 (W.D. Va. 2000) (rejecting total exhaustion rule).

exhausted claims, while those in the Tenth Circuit will not. Prisoners in the other circuits will see their claims treated differently depending on how the district courts in that circuit read the inconsistent precedents. The result will be inequitable treatment of prisoners' claims, confusion, and delay.

Moreover, this issue will not be resolved without this Court's intervention. The circuits are now in deep conflict and there is no movement toward a consensus view. As explained above, the Ninth Circuit recently issued a decision rejecting the total exhaustion rule in *Lira* just a few weeks after the Sixth Circuit refused to grant rehearing to reconsider a panel decision adopting that rule in *Bey*. The appellate courts are well aware that a circuit split exists, and they have all heard the arguments made by their sister circuits, and thus there is no likelihood that they will ever reach agreement on this issue.

Finally, this issue recurs on a regular basis. In the last 30 days alone, 13 different district courts addressed the question whether a prisoner had satisfied the "total exhaustion" requirement. The outcome of over 100 cases a year turns on which rule is in place, and thus it is an issue worthy of this Court's review.

**II. The PLRA Does Not Create a Total Exhaustion Rule.**

Certiorari is also warranted here because the Tenth Circuit's decision is wrong on the merits. The PLRA provides that "[n]o action shall be brought . . . until such administrative remedies as are available are exhausted," 42 U.S.C. 1997e(a), but it nowhere mandates the dismissal of *exhausted* claims simply because they are included in a complaint containing unexhausted claims. Further, the section of the PLRA addressing dismissals, 42 U.S.C. 1997e(c), explicitly states that

certain claims "shall" be "dismissed" – such as frivolous or malicious claims – but does not include exhausted claims accompanying unexhausted claims in that list. This omission is textual evidence that exhausted claims in a mixed complaint should not be dismissed.

The Tenth Circuit concluded otherwise because section 1997e(a) states that "[n]o *action* shall be brought" until administrative remedies are exhausted rather than "no *claim* shall be brought." *Ross,* 365 F.3d at 1190. Section 1997e(a) does not, however, state that an "action" with unexhausted claims must be dismissed, but only that no such action may be "brought." At issue is whether the proper response to an action containing exhausted and unexhausted claims is to dismiss the entire action, or only those claims that violate section 1997e(a)'s exhaustion requirement; that is, as the Second Circuit put it, whether the only option is to "kill it rather than to cure it." *Ortiz*, 380 F.3d at 657. Nothing in the text of the PLRA requires dismissal of exhausted claims just because they are brought in a complaint with unexhauste laims.

Furthermore, the Tenth Circuit failed to notice that the terms "action" and "claim" are used interchangeably throughout the rest of the statute. For example, ection 1997e(c)(1) requires that courts "dismiss any action' hat is "frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief." Yet courts do not dismiss the entire "action" just because one claim is frivolous or otherwise improper. As the description of the type of "actions" to be dismissed makes clear, the word "action" actually refers to individual claims, such as those that "fail to state a *claim* upon which relief can be granted," and not the entire lawsuit.

Similarly, section 1997e(e) provides that "[n]o Federal civil action may be brought by a prisoner . . . for mental or emotional injury suffered while in custody without prior showing of physical injury." Although section 1997e(e), like section 1997e(a), states that no such "action" "may be brought," a court faced with complaints containing proper claims, as well as claims of emotional injury unaccompanied by physical injury, dismissed only the latter claims, allowing the proper claims to go forward. *See Robinson v. Page*, 170 F.3d 747, 748-49 (7th Cir. 1999) (Posner, C.J.) (holding that to require dismissal of entire action because of one flawed claim would be "a weird result that has no support in the language or purpose of the statute").

As the Second and Ninth Circuits recognized, a total exhaustion rule is also at odds with the PLRA's goal of streamlining inmate litigation. Dismissing an entire action on the ground that at least one claim in the complaint is unexhausted only serves to delay litigation of the exhausted claims and needlessly burdens the federal courts. When presented with a prisoner's complaint, a district court must first analyze each of the prisoner's claims and then determine whether those claims have been exhausted – a process that can be tedious and time-consuming in any lawsuit, and is especially burdensome when a prisoner is *pro se* and has submitted a handwritten complaint, as is often the case. If the judge is then obligated to dismiss every claim simply because one claim is not exhausted, prisoners will often refile the very same complaint minus the unexhausted claim. The case may then come before another judge who will have to begin the time-consuming process of reviewing the prisoner's claims anew.

Moreover, the total exhaustion rule would create an incentive for prisoners to file each claim in a separate lawsuit at the outset to avoid the harsh results of having an entire complaint dismissed if even just one claim is unexhausted. Either result would undermine the PLRA's goal of reducing the quantity and improving the quality of prisoner litigation. *See Porter*, 534 U.S. at 524.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 16, 2005

United States Court of Appeals,
Tenth Circuit,

ORLANDO CORTEZ CLARK, Plaintiff-Appellant,
v.
COLORADO DEPARTMENT OF CORRECTIONS;
DR. NWEKE, C.C.C.F. Medical;
DR. FALLHOUSE, C.C.C.F. Medical;
JOSEPH WERMER, Dr., A.V.C.F. Medical;
CINDRA MARTINEZ, MRT II, A.V.C.F. Medical;
ANTHONY DECESARO, CDOC Grievance Officer;
DR. RAYMOND L. LILLY;
DR. KENNETH D. DANYLCHUCK, Defendants-Appellees.
No. 05-1121

Filed: October 3, 2005

ORDER AND JUDGMENT[1]

Before EBEL, MCKAY, and HENRY, Circuit Judges.

After examining appellant's brief and the appellate

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[1]This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10TH CIR. R. 36.3.

record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See FED. R. APP. P. 34(a); 10TH CIR. R. 34.1(G). The case is therefore ordered submitted without oral argument.

Orlando Cortez Clark, a prisoner appearing pro se, brings suit pursuant to 42 U.S.C. § 1983. He argues that the Colorado Department of Corrections and its various employees violated his Eighth Amendment right to be free of cruel and unusual punishment. He contends that the defendants were deliberately indifferent to his medical needs. Exercising jurisdiction pursuant to 28 U.S.C. § 1291, we AFFIRM the judgments of the district court (1) dismissing Mr. Clark's suit for failure to exhaust his administrative remedies and (2) denying his motion to reconsider.

## I. BACKGROUND

Mr. Clark is a prisoner in the custody of the Colorado Department of Corrections ("DOC") at the Arkansas Valley Correctional Facility in Crowley, Colorado. He initiated this action by filing a § 1983 claim in which he alleged that the defendants were deliberately indifferent to his medical needs because (1) he was denied effective medication for severe back and leg pain for an extended period of time, and his necessary back surgery was improperly delayed; and (2) after his eventual surgery, he did not receive prescribed pain medication, orthopedic shoes, certain hose for his legs, a leg brace, or a medical pillow in a timely manner. The district court dismissed Mr. Clark's claims without prejudice because he failed to exhaust administrative remedies as to his first claim.

## II. DISCUSSION

We review de novo a district court's dismissal of an inmate's suit for failure to exhaust administrative remedies. Jernigan v. Stuchell, 304 F.3d 1030, 1032 (10th Cir. 2002). The Prison Litigation Reform Act ("PLRA") states that "no action

shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a); see also Porter v. Nussle, 534 U.S. 516, 524, 152 L. Ed. 2d 12, 122 S. Ct. 983- 25, 534 U.S. 516, 152 L. Ed. 2d 12, 122 S. Ct. 983 (2002). In addition, we have held that "the PLRA contains a total exhaustion requirement, and . . . the presence of unexhausted claims in [a prisoner]'s complaint requires [a] district court to dismiss his action in its entirety without prejudice." Ross v. County of Bernalillo, 365 F.3d 1181, 1189 (10th Cir. 2004).

We agree with the district court that Mr. Clark appears to have exhausted administrative remedies as to his second claim of relief. Regarding his first claim, Mr. Clark asserted in the third stage of his formal grievance procedure that he was denied effective pain medication and that he needed surgery. However, he failed to make those allegations in the first two stages of the formal grievance procedure. The DOC Administrative Regulations do not allow an inmate to raise in a subsequent step an issue that was not raised in each prior step. See Colo. Dep't of Corr. Admin. Reg. 850-4(IV)(B)(3)(b) ("A substantive issue may not be added at a later step if it has not been contained in each previous step of that particular grievance."). Therefore, because Mr. Clark failed to exhaust his administrative remedies with respect to his first claim, the district court correctly dismissed his entire complaint without prejudice. See Ross, 365 F.3d at 1189.

Furthermore, we conclude that the district court did not abuse its discretion in denying Mr. Clark's motion to reconsider. See Elsken v. Network Multi-Family Sec. Corp., 49 F.3d 1470, 1476 (10th Cir. 1995) ("We review a denial of a motion to reconsider only for an abuse of discretion."). Although we construe his pleadings liberally, see Haines v.

Kerner, 404 U.S. 519, 520-21, 30 L. Ed. 2d 652, 92 S. Ct. 594 (1972), Mr. Clark has neither alleged the existence of new law or evidence, nor made any convincing arguments that clear error exists or manifest injustice has been done. See Servants of Paraclete v. Doe, 204 F.3d 1005, 1012 (10th Cir. 2000) ("Grounds warranting a motion to reconsider include (1) an intervening change in the controlling law, (2) new evidence previously unavailable, and (3) the need to correct clear error or prevent manifest injustice.").

**III. CONCLUSION**

For substantially the same reasons identified by the district court in its well-reasoned decision, we AFFIRM the dismissal of Mr. Clark's § 1983 claim, and we AFFIRM the district court's denial of his motion to reconsider. We GRANT Mr. Clark's renewed motion to proceed without prepayment of the appellate filing fee, and we remind him that he is obligated to continue making partial payments until the entire fee has been paid.

Entered for the Court

Robert H. Henry

Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

No. 04-ES-2414
February 2, 2005

ORLANDO CORTEZ CLARK,
Plaintiff,
v.
THE COLORADO DEPARTMENT OF CORRECTIONS, et al.,
DR. NWEKE, C.C.C.F. Medical,
DR. FALLHOUSE, C.C.C.F. Medical,
DR. JOSEPH WERMER, A.V.C.F. Medical,
CINDRA MARTINEZ, MRT II, A.V.C.F. Medical,
ANTHONY DeCESARO, CDOC Grievance Officer,
DR. RAYMOND L. LILLY, and
DR. KENNETH D. DANYLCHUCK,
Defendants.

ORDER AND JUDGMENT OF DISMISSAL

Plaintiff Orlando Cortez Clark is a prisoner in the custody of the Colorado Department of Corrections (DOC) at the Arkansas Valley Correctional Facility at Crowley, Colorado. Mr. Clark initiated this action by filing *pro se* a Prisoner Complaint pursuant to 42 U.S.C. § 1983 alleging that his constitutional rights have been violated. On December 8, 2004, Magistrate Judge O. Edward Schlatter ordered Mr. Clark

to file an amended complaint in which he alleges specific facts to demonstrate how each Defendant personally participated in the asserted constitutional violations. Magistrate Judge Schlatter also advised Mr. Clark that the claims he seeks to raise in this action must be limited to those issues for which he has exhausted administrative remedies. On December 17, 2004, Mr. Clark filed his amended complaint.

The Court must construe the amended complaint liberally because Mr. Clark is representing himself. *See Haines v. Kerner*, 404 U.S. 519, 520-21 (1972); *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). If the amended complaint reasonably can be read "to state a valid claim on which the plaintiff could prevail, [the Court] should do so despite the plaintiff's failure to cite proper legal authority, his confusion of various legal theories, his poor syntax and sentence construction or his unfamiliarity with pleading requirements." *Hall*, 935 F.2d at 1110. However, the Court should not be the *pro se* litigant's advocate. *See id.* For the reasons stated below, the action will be dismissed for failure to exhaust administrative remedies.

Pursuant to 42 U.S.C. § 1977e(a), "[n]o action shall be brought with respect to prison conditions under ... any ... Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." This "exhaustion requirement applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong." *Porter v. Nussle*, 534 U.S. 516, 532 (2002). Mr. Clark is a prisoner confined in a correctional facility and the claims he raises in this action relate to prison conditions. Therefore, Mr. Clark must exhaust the available administrative remedies. Furthermore, § 1997e(a) "imposes a pleading requirement on the prisoner." *Steele v. Fed. Bureau of Prisons*, 355 F.3d 1204, 1210, (10th

Cir. 2003). To satisfy the burden of pleading exhaustion of administrative remedies, Mr. Clark must "either attach copies of administrative proceedings or describe their disposition with specificity." *Id.* at 1211.

To exhaust administrative remedies under the DOC grievance procedure, an inmate first must attempt to resolve the matter informally. *See* DOC Administrative Regulation 850-4, Grievance Procedure at IV.D.1. After attempting informal resolution, the inmate must complete the three-step formal grievance procedure. *See* DOC Administrative Regulation 850-4, Grievance Procedure at IV.D.2 - D.4. If a grievance is denied after a review of the substantive issues presented, the response at the third and final step of the formal grievance procedure certifies that the grievance procedure has been exhausted. *See* DOC Administrative Regulation 850-4, Grievance Procedure at IV.D.4.g.

Mr. Clark alleges that he has exhausted administrative remedies and he attaches to his original complaint in this action copies of the three administrative grievances he filed. Mr. Clark pursued each of the three grievances to the third and final step of the DOC grievance procedure and the responses to his step III grievances certify that Mr. Clark has exhausted the grievance process. However, for the reasons discussed below, the Court finds that Mr. Clark is raising in this action issues that he did not raise in any of the three administrative grievances.

Mr. Clark asserts two claims for relief in this action. Both claims are asserted pursuant to the Eight Amendment and allege deliberate indifference to Mr. Clark's serious medical needs. Mr. Clark alleges in his first claim that Defendants denied him effective medication for severe lower back and leg pain for an extended period of time beginning in April 2001 and delayed necessary back surgery after it was apparent that

surgery was necessary. Mr. Clark's second claim focuses on allegedly inadequate medical care he received after his back surgery on May 7, 2003. He specifically alleges in his second claim that he did not receive prescribed pain medication, orthopedic shoes, TED hose, an ankle/foot brace, or a medical pillow in a timely manner.

Two of the administrative grievances Mr. Clark filed related to the post-operative care he has received and include his complaints that he did not receive prescribed pain medication, orthopedic shoes, TED hose, an ankle/foot brace, or a medical pillow in a timely manner. The two grievances relating to Mr. Clark's post-operative care issues are, as noted above, attached to the original complaint filed in this action and they are identified as Grievance #CAV 03/04-065 and Grievance #CAV 03/04-290. Based on these two grievances, it appears that Mr. Clark has exhausted administrative remedies with respect to his second claim for relief in this action.

The third grievance attached to the original complaint is identified as Grievance #CAV 02/03-006. Mr. Clark stated in Grievance #CAV 02/03-006 that he was suffering from severe lower back and leg pain and he asked for an extra mattress to alleviate the pain. He did not mention in either of the first two steps of the formal grievance procedure regarding Grievance #CAV 02/03-006 that he was being denied effective pain medication or that necessary surgery was being delayed. Mr. Clark did assert in the third step of the formal grievance procedure regarding Grievance #CAV 02/03-006 that he had been denied effective pain medication and that he needed surgery. However, Mr. Clark did not exhaust administrative remedies with respect to his claim that he was denied effective pain medication and that necessary surgery was being delayed because the DOC grievance procedure does not allow an inmate to raise in a subsequent step an issue that was not raised in each prior step. *See* DOC Administrative Regulation 850-4,

Grievance Procedure at IV.B.2.e. In accordance with this policy, the response to Mr. Clark's Step III grievance regarding Grievance #CAV 02/03-006 is limited to the issue of the extra mattress.

Therefore, the Court finds that Mr. Clark has failed to exhaust administrative remedies for his first claim. As a result, the entire complaint must be dismissed because § 1997e(a) imposes a total exhaustion requirement on prisoners. *See Ross v. County of Bernalillo*, 365 F.3d 1181, 1189 (10th Cir. 2004). Accordingly, it is

ORDERED that the complaint, the amended complaint, and the action are dismissed without prejudice pursuant to 42 U.S.C. § 1997e(a) for failure to exhaust administrative remedies. It is

FURTHER ORDERED that judgment is entered in favor of Defendants and against Plaintiff.

DATED at Denver, Colorado, this 1 day of February, 2005.

BY THE COURT:

ZITA L. WEINSHIENK, Senior Judge

United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 04-ES-2414
Filed: December 8, 2004

ORLANDO CORTEZ CLARK,
Plaintiff,
v.
THE COLORADO DEPARTMENT OF CORRECTIONS, et al.,
DR. NWEKE, C.C.C.F. Medical,
DR. FALLHOUSE, C.C.C.F. Medical,
DR. JOSEPH WERMER, A.V.C.F. Medical,
CINDRA MARTINEZ, MRT II, A.V.C.F. Medical,
ANTHONY DeCESARO, CDOC Grievance Officer,
DR. RAYMOND L. LILLY, and
DR. KENNETH D. DANYLCHUCK,
Defendants.

ORDER DIRECTING PLAINTIFF TO FILE AMENDED COMPLAINT

Plaintiff Orlando Cortez Clark is a prisoner in the custody of the Colorado Department of Corrections at the Arkansas Valley Correctional Facility at Crowley, Colorado. Mr. Clark has filed *pro se* a Prisoner Complaint pursuant to 42 U.S.C. § 1983 alleging that Defendants have violated his rights under the United States Constitution. The court must construe

the complaint liberally because Mr. Clark is representing himself. *See Haines v. Kerner*, 404 U.S. 519, 520-21 (1972); *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). However, the court should not be the *pro se* litigant's advocate. *See Hall*, 935 F.2d at 1110. For the reasons stated below, Mr. Clark will be ordered to file an amended complaint.

The court has reviewed the complaint filed in this action and finds that it is deficient because Mr. Clark fails to allege facts that demonstrate how each Defendant personally participated in the asserted violations of his rights. Personal participation is an essential allegation in a civil rights action. *See Bennett v. Passic*, 545 F.2d 1260, 1262-63 (10th Cir. 1976). To establish personal participation, Mr. Clark must show that each Defendant cause the deprivation of a federal right. *See Kentucky v. Graham*, 473 U.S. 159, 166 (1985). There must be an affirmative link between the alleged constitutional violation and each Defendant's participation, control or direction, or failure to supervise. *See Butler v. City of Norman*, 992 F.2d 1053, 1055 (10th Cir. 1993). A Defendant may not be held liable on a theory of respondeat superior merely because of his or her supervisory position. *See Pembaur v. City of Cincinnati*, 475 U.S. 469, 479 (1986); *McKee v. Heggy*, 703 F.2d 479, 483 (10th Cir. 1983).

Mr. Clark will be ordered to file an amended complaint in which he alleges specific facts to demonstrate how each Defendant personally anticipated in the asserted constitutional violations. Mr. Clark is reminded that 42 U.S.C. § 1983 "provides a federal cause of action against any person who, acting under color of state law, deprives another of his federal rights." *Conn v. Gabbert*, 526 U.S. 286, 290 (1999). Therefore, Mr. Clark should name as Defendants in the amended complaint the individuals he believes actually violated his rights.

Mr. Clark also is advised that the claims he seeks to raise in this action must be limited to those issues for which he has exhausted administrative remedies. Pursuant to 42 U.S.C. §§1997e(a), "[n]o action shall be brought with respect to prison conditions under ... any ... Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." This "exhaustion requirement applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong." *Porter v. Nussle*, 534 U.S. 516, 532 (2002). Furthermore, § 1997e(a) "impose a pleading requirement on the prisoner." *Steele v. Fed. Bureau of Prisons*, 355 F.2d 1204, 1210 (10th Cir. 2003). To satisfy the burden of pleading exhaustion of administrative remedies, Mr. Clark must "either attach copies of administrative proceedings or describe their disposition with specificity." *Id.* at 1211. Section 1997e(a) also imposes a total exhaustion requirement on prisoners. *See Ross v. County of Bernalillo*, 365 F.3d 1181, 1189 (10th Cir. 2004). Therefore, if Mr. Clark has not exhausted administrative remedies with respect to each claim he asserts, the entire complaint must be dismissed. Accordingly, it is

ORDERED that Mr. Clark file **within thirty (30) days from the date of this order** an amended complaint that complies with this order. It is

FURTHER ORDERED that the clerk of the court mail to Mr. Clark, together with a copy of this order, two copies of the following forms: Prisoner Complaint. It is

FURTHER ORDERED that Mr. Clark submit sufficient copies of the amended complaint to serve each named Defendant. It is

FURTHER ORDERED that, if Mr. Clark fails within the time allowed to file an original and sufficient copies of an

amended complaint that complies with this order to the court's satisfaction, the action will be dismissed without further notice.

DATED at Denver, Colorado, this 8 day of December, 2004.

BY THE COURT:

O. EDWARD SCHLATTER
United States Magistrate Judge

(2)



NO. 05-816

IN THE SUPREME COURT OF THE UNITED STATES

ORLANDO CORTEZ CLARK,

***Petitioner,***

v.

COLORADO DEPARTMENT OF CORRECTIONS, *et al.*,

***Respondents.***

On Petition for Writ of Certiorari to
The United States Court of Appeals for the Tenth Circuit

# BRIEF OF THE RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether the Prison Litigation Reform Act requires dismissal of all claims brought by a prisoner, including claims that have been administratively exhausted, when at least one claim has not been exhausted.

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## STATEMENT

In *Ross v. County of Bernalillo*, 365 F.3d 1181 (10th Cir. 2004), the Tenth Circuit held that an inmate cannot proceed on any civil rights claims concerning conditions of confinement until he has exhausted all available administrative remedies for each of those claims. The decision relied on 42 U.S.C. § 1997e(a), enacted as part of the Prison Litigation Reform Act of 1995 ("The Prison Litigation Reform Act" or "PLRA"), as well as prior rulings from this Court requiring total exhaustion of all available remedies before filing an application for a writ of habeas corpus.

In this case, the United States District Court for the District of Colorado, relying on this "total exhaustion" rule, dismissed Petitioner Orlando Clark's civil rights claim because it contained at least one unexhausted claim. The Tenth Circuit affirmed that ruling in an unpublished opinion that relied on *Ross*, although it did give him the inmate the option of dismissing, without prejudice, the unexhausted claim so that he could proceed to litigate the claims that had been exhausted. Clark requests this court grant certiorari to review the total exhaustion rule.

## REASONS FOR DENYING THE PETITION

On March 6, 2006, this Court granted certiorari in *Jones v. Bock*, 05-7058 and in *Williams v. Overton*, 05-7142. These cases address the same issue as is raised here and in *Ross v. County of Bernalillo*. This case is not factually distinct from those cases. Therefore, the petition for certiorari should be held pending this Court's decisions in *Jones* and in *Williams*. If this Court adopts the "total exhaustion" rule, the petition for certiorari should be denied.

The U.S. Court of Appeals for the Tenth Circuit correctly interpreted the PLRA when it found that the PLRA requires total exhaustion of available remedies for all claims raised in the complaint. In *Ross*, an inmate sued a county jail after he slipped and fell in a shower. The Court of Appeals found that the inmate had exhausted all available remedies for his claim concerning the slippery floor. However, he had not exhausted all available remedies concerning alleged lack of medical care for his injury. The Court of Appeals agreed with the U.S. Court of Appeals for the Eighth Circuit that the PLRA requires exhaustion of all available remedies on all claims. *Ross v. County of Bernalillo*, 365 F.3d at 1188-89 (citing *Graves v. Norris*, 218 F.3d 884, 885 (8th Cir. 2000)). The Tenth Circuit also relied on this Court's precedents concerning a "total exhaustion" requirement in habeas corpus cases. *Ross*, 365 F.3d at 1189-90. Finally, the Court observed that the purpose of the PLRA is to encourage inmates to make full use of prison grievance procedures, give prison officials the first opportunity to resolve all disputes, and provide courts with a full administrative record that would relieve the courts of the burden of winnowing exhausted from unexhausted claims. *Id.* at 1190.

Resolution of all related disputes between an inmate and prison officials in one action is consistent with the explicit language of the PLRA. As this Court has stated, "[I]nterpretation of a statute must begin with the statute's language." Mallard v. United States District Court, 490 U.S. 296, 309 (1989). Section 1997e(a) provides, in pertinent part: "No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a) (emphasis added). The statute does not say no "claim" shall be brought until available remedies are exhausted. It does not state or imply that an action may proceed if some claims

have been exhausted while others remain unexhausted. The plain language of the statute unequivocally expresses the intent to require that an inmate complete the inmate grievance process before filing suit. *Graves v. Norris*, 218 F.3d at 885. As other parts of the PLRA note, an "action" is more than a "claim." *See, e.g.*, 18 U.S.C. § 3626(g)(2) (defining "civil action" as a "civil proceeding"). It is also significant that 42 U.S.C. § 1997e(c)(1) permits a court to dismiss an entire "action" if the "action" is frivolous, while § 1997e(c)(2) permits a court to dismiss a frivolous "claim" without requiring exhaustion of remedies while permitting the remainder of the action to proceed (provided that the inmate has exhausted all available administrative remedies as required by § 1997e(a)). In § 1997e(c)(1) and § 1997e(c)(2), Congress demonstrated that it knows the difference between an "action" and a "claim."

The purpose behind the PLRA also provides support for the total exhaustion rule. This Court has indicated that the PLRA is to be strictly interpreted as to require exhaustion wherever possible. "For litigation within § 1997e(a)'s compass, Congress has replaced the 'general rule of non-exhaustion' with a general rule of exhaustion." *Porter v. Nussle*, 534 U.S. 516, 525 (2002). For example, in *Booth v. Churner*, 532 U.S. 731 (2001), the Supreme Court ruled that administrative remedies must be exhausted even if some of the relief sought is not available through the administrative process. This Court subsequently ruled that Congress eliminated the discretion of district courts to dispense with administrative exhaustion. Exhaustion is required even when the available administrative remedies appear futile, as long as authorities at the administrative level have power to take some responsive action. *Porter*, 534 U.S. at 529. The philosophy behind the PLRA is to reduce needless inmate litigation by giving state corrections departments the ability to resolve as many disputes as possible at their level before an inmate burdens the courts:

> Beyond doubt, Congress enacted § 1997e(a) to reduce the quantity and improve the quality of prisoner suits; to this purpose, Congress afforded corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case. In some instances, corrective action taken in response to an inmate's grievance might improve prison administration and satisfy the inmate, thereby obviating the need for litigation. In other instances, the internal review might "filter out some frivolous claims." And for cases ultimately brought to court, adjudication could be facilitated by an administrative record that clarifies the contours of the controversy.

*Porter*, 534 U.S. at 524-25 (emphasis added and citations omitted). Petitioner's partial exhaustion approach defeats that purpose.

The partial exhaustion rule proposed by Petitioner would also conflict with the principle of judicial economy by *always* burdening several courts, juries and witnesses with multiple trials involving the same set of facts. For example, under Petitioner's interpretation, an inmate could proceed on an excessive force claim, such as that in *Porter*, in court while still exhausting the grievance process on a related claim that medical personnel were deliberately indifferent to the injuries he allegedly sustained as a result of that force. If the guards' defense was that the force used was minimal under the circumstances, they would seek to present testimony from medical personnel that no injuries were sustained, or that the injuries were so minor as to require no

medical care. Subsequently, after exhaustion on the second claim, those same medical personnel would be required to testify in their own separate trial that they were not deliberately indifferent because there were no serious medical needs that required medical attention. Thus, two separate cases would cover the same evidence concerning the same episode. Separate discovery, pretrial conferences, witness lists, juries, and judges would be required at different times to adjudicate two claims arising out of the same episode. In contrast, the total exhaustion rule would cause the episode to be considered in one civil case after prison officials had been able to review all facets of the episode and to respond to all grievances.

The PLRA is designed to reduce inmate "suits" to a more manageable level. *Porter*, 534 U.S. at 527-28. "Split proceedings" are not only discouraged, they are banned by the PLRA. *Id.* at 530-31. By permitting multiple suits to proceed on the same related incident, Petitioner's partial exhaustion proposal defeats that purpose. In contrast, the total exhaustion principle announced in *Ross* permits the inmate to pursue all of his claims, but only after he has exhausted all of those claims so that he may only proceed with one "action." As the Tenth Circuit Court of Appeals noted, the total exhaustion rule reduces the likelihood of "piecemeal litigation." *Ross*, 365 F.3d at 1190. As inmates learn that piecemeal litigation will result in multiple filing fees, they will wish to exhaust all available administrative remedies so as to avoid piecemeal litigation. Thus, enforcement of the total exhaustion rule's sanction of dismissal will encourage each inmate to address all pending disputes with prison officials at one time, to reach resolution on as many issues as possible before resorting to the courts, and to consolidate all remaining claims in one action before one court. As this Court noted, "[R]esort to a prison

grievance process must precede resort to a court." *Porter v. Nussle*, 534 U.S. at 529 (emphasis added).[1]

In conflict with this principle, the partial exhaustion rule will either require inmates to bring related claims arising from the same episode in separate court actions or to abandon the unexhausted claims in order to proceed on the exhausted claim.[2]

As noted in *Ross*, 365 F.3d at 1189-90, in the analogous situation of federal habeas corpus relief, this Court has required an inmate to exhaust all available remedies rather than proceed to court with a split petition. The Court observed that the total exhaustion rule serves the purpose of deference to state courts. The Petitioner's partial exhaustion proposal conflicts with these decisions. *See, e.g., Preiser v.*

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[1] Another part of the PLRA is also consistent with this purpose. 28 U.S.C. § 1915(b) requires even indigent inmates to pay the filing fee in full in installment payments. Therefore, there is a great financial incentive for any inmate to combine as many claims as possible into one action rather than file claims piecemeal. The overall scheme encourages inmates to attempt to resolve all disputes with prison officials before bringing a civil action in federal court.

[2] Arguably, two separately filed claims could be joined for one trial after all available remedies have been exhausted. However, such a procedure would disrupt the original schedule established by the first judge, result in multiple discovery, and possibly require a continuance of the original trial date. The total exhaustion rule, which permits dismissal of all claims without prejudice, would make this scenario less likely by encouraging resolution of all issues at the administrative level, followed by the filing of one complaint.

*Rodriguez*, 411 U.S. 475, 499-500 (1973); *Rose v. Lundy*, 455 U.S. 509, 520-22 (1982).

## CONCLUSION

For the foregoing reasons, this Court should hold the petition for writ of certiorari in this case pending the outcome of its decisions in *Jones* and *Williams*. If the Court reverses those cases and adopts the "total exhaustion" rule, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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